IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1903.

THE FIRST NATIONAL BANK OF CHICAGO, H. W. ROGERS and JAMES C. ROGERS, as H. W. ROGERS & BROTHER, *Petitioners*, vs. THE CHICAGO TITLE & TRUST COMPANY, Trustee of Alexander Rodgers, Bankrupt, JAMES A. PATTEN, et al., *Respondent*.	Petition for Certiorari.

BRIEF OF PETITIONERS IN OPPOSITION TO MOTION TO QUASH.

Petitioners resist this motion to quash upon the following grounds:

I.

THE QUESTION RAISED BY THIS MOTION HAS ALREADY BEEN DECIDED BY THE COURT AGAINST RESPONDENTS.

The ground of this motion to quash is, that this is not a case for *certiorari*, because the proceeding in the District Court was not a "proceeding in bankruptcy," but an independent or plenary suit, in which an

appeal lay to the Circuit Court of Appeals and from that court to this.

Identically the same question was presented upon the application for *certiorari*. Respondents filed a brief in resistance of the granting of a *certiorari* herein, in which they stated (brief, pp. 12-19):

"The petitioners had a right to carry the case from the Circuit Court of Appeals to this court by appeal or writ of error, and there is no occasion or necessity for a writ of certiorari.

a. The controversy in the District Court was in the nature of an independent or plenary suit, presented on the equity side of the court under its general powers, and the right of appeal existed under Section 24 (a) of the Bankruptcy Act.

b. There was such right of appeal, also, under Section 6 of the Act of 1891, creating the Circuit Courts of Appeals which is not abridged by the Bankruptcy Act. * * *

The following cases illustrate what is a controversy or suit, not a part of administrative proceedings merely, and what is appealable and reviewable upon the facts as well as law."

We insert here but a skeleton of this argument.

On the other hand, petitioners contended in their brief as follows (pp. 7, 9, 10):

"As neither of these petitioners consented to be sued in that court, the proceeding there cannot be deemed an independent suit, nor, as such, be the basis of an appeal to the Circuit Court of Appeals under the act establishing those courts. * * *

The proceeding in the District Court being, then, 'a proceeding in bankruptcy,' the only jurisdiction which the Circuit Court of Appeals had thereof arose out of the following provisions of the bankruptcy act of 1898. * * *

It follows, then, that no *appeal* lay from the District Court to the Circuit Court of Appeals, and that the

only jurisdiction the latter court had was under Sec. 24b upon a petition for revision."

Thus this identical question was raised upon the application for a *certiorari*. If the position now, and then, taken by respondent is sound, it was a complete answer to the application, and in granting the *certiorari*, this court necessarily decided the question against respondents.

The one year in which petitioners might have perfected an appeal having expired, respondents seek again to raise this question. Our contention is that respondents are now in no position to do so.

The right of the court of its own motion to raise the question again we need not consider or deny. We do, however, contend, that, as the question has once been raised by respondents, this court may properly consider it as settled for this case, and should do so in view of the fact that petitioners, in reliance upon the fact that this court had exercised its jurisdiction to issue the writ over the objections of respondents that it was not a case for *certiorari*, had allowed the year for appealing to expire without doing so.

Again, even if the court should now be of the opinion that this is not a proper case for *certiorari*, it might well now be treated as here upon appeal. This concerns merely a question of *method*. The scope of the court's jurisdiction to consider and dispose of the case is the same whether here by *certiorari* or by appeal.

II.

THIS IS A CASE FOR CERTIORARI.

As already stated, the only basis of this motion is that this case, when in the District Court, was an independent suit, as distinguished from a proceeding in bankruptcy, and that therefore an appeal lay to the Circuit Court of Appeals, and thence here. Thus the controlling question upon this motion is, *what is the nature of the proceeding in the District Court?*

This is to be determined by considering the proceeding as a whole, and not any part of it, nor any particular order in it. Again, it is to be determined by considering what the proceeding, under the law, properly is, and not what the District Court had declared it to be, or attempted to make it; otherwise it would be within the power of the District Court to itself fix, against the provisions of the statute, the nature of the proceeding.

This proceeding originated by the filing, in the District Court, by the receiver in bankruptcy of his petition, entitled in said court and "In the matter of Alexander Rodgers, Bankrupt, In Bankruptcy, No. 5810." It recites (Rec., 5) that the receiver "*has taken possession of*" certain seed, for which there was then an active market, and that it would be of great advantage to the estate and its creditors to have such seed sold immediately, and prayed the direction of the court in the premises, and that, if the sale was made, any liens thereon be transferred to the proceeds. The petition also recites a notice to these petitioners

and others of the presentation of such petition to the court on a certain date. (Rec., 5, 6.)

Thereupon each of these petitioners filed a pleading (Rec., 8-15), reciting an appearance *solely for the purpose of denying the jurisdiction* of the District Court to enter the order prayed, and in support thereof, averring that said seed was not, and never had been, in the possession of said receiver, but was, at the time of, and prior to, the bankruptcy proceedings, in the possession of the National Storage Company, which had issued warehouse receipts therefor, which had been severally endorsed by way of pledge to, and were held by, the petitioners in this court respectively. Each pleading asked that the receiver's petition be dismissed for want of jurisdiction. A similar pleading was filed by the National Storage Company. (Rec., 16 to 20.)

Thereupon the proceeding was, by the court, referred to one of the regular referees in bankruptcy, who, on the 5th of August, 1901, filed an elaborate report (Rec., 29-45), reciting that he had taken a great deal of evidence, and setting out the transactions which had resulted in the disputed claims of possession; that in his opinion "the status could not have been changed by any action of the receiver from what the situation was at the time of his appointment," and that "the bankrupt was not at the date of the filing of his petition in bankruptcy in this case, or at the date of the adjudication in bankruptcy, in possession" of said seed; * * * "and * * * had not at the date of the filing of the petition or the adjudication in this cause, and has not, possesison or right to possession, of said

property;" and recommending that an order to this effect be entered, and that the court could not, in his opinion, "maintain jurisdiction" of such proceeding, and recommending that it be dismissed.

Exceptions were filed by these respondents, and upon the hearing of these, the District Court on August 5th, 1901, entered an order finding that the receiver "received and took possession from the bankrupt peaceably the property in question, * * * and that the court had jurisdiction and possession of the said property in this cause"; sustaining the exceptions to the master's report as to possession and jurisdiction of the court, and, on the agreement of the petitioner, First National Bank, through its attorney, to sell said seed and hold the funds "subject to the further order of the court herein," it was ordered that said bank proceed at once to sell such seed, and report thereon to the court. (Rec., 55.) On the next day an order was entered reserving the rest of said report for further consideration by the court. (Rec., 56.)

On the 13th of September, 1901, the First National Bank filed its report of its sale of the seed and its possession of the proceeds ($15,773.41).

Thereupon on the 16th and 23rd days of September, and the 3rd of October, 1901 (Rec., pp. 67, 80, 100), these petitioners and the National Storage Company filed separate petitions asserting their respective rights in said seed, and asking for the payment of the claims, for which said seed was pledged, out of the proceeds of the said sale, the petition of the National Storage Company, also asking the payment to it of warehouse charges.

On the 11th of October, 1901, on motion of the Trustee, these petitions and answers were consolidated, and the case was referred back to the same referee to take additional proofs, and it was ordered that the matter be heard by the court upon the evidence already taken and any further evidence. (Rec., 109.)

On the 29th of October, 1902, said cause coming on for hearing in the District Court, upon the original report of the referee and exceptions thereto, and the subsequent evidence, an order or decree was entered (Rec., pp. 114-116) confirming the referee's first report, dated August 5, 1901, "except in so far as the same finds a lack of jurisdiction in this court, which jurisdiction is hereby sustained." This decree also finds that "the receiver in this case had *not*, at the time of the filing of its petition herein, to wit, on May 13, 1901, the right of possession" to the seed in controversy, but that "the National Storage Company was, at the said date, and also at the time of the filing of the petition in bankruptcy herein, entitled to possession, and had possession of said property." The decree then orders the money paid to these petitioners respectively except a few dollars paid to the National Storage Company for its storage charges. In other words, the court receded from its prior decision as to possession, but re-asserted its jurisdiction of the case.

Can there, under these circumstances, be any question that this proceeding in the District Court was a *proceeding in bankruptcy?*

In form it is such, and was so regarded by those who instituted it. The initial petition is entitled in

the bankruptcy court. It is in form a petition of a receiver in bankruptcy for directions of the court respecting a sale of property alleged by such receiver to be in *his possession*. It contains no direct prayer for any adjudication of rights, but asks that, if there are any liens, they shall be transferred to the fund arising from the sale—which necessarily involves an adjudication by the bankruptcy court upon the validity and existence of liens.

The case of *Bardes* v. *Hawarden Bank*, 178 U. S., 524, and subsequent cases, hold that the distinction, existing under the prior bankrupt law, between a *proceeding in bankruptcy* "initiated by the petition, and ending in the distribution of assets amongst the creditors, and the discharge or refusal of a discharge of the bankrupt," and an *independent suit* to determine a controversy between the trustee in bankruptcy and a claimant of an adverse interest, is also contemplated by the present bankrupt act. Hence, the decisions under the previous act, as to what constituted an independent suit, and when a proceeding was a part of the bankruptcy case, are in point under the present act.

Under the bankrupt law of 1867 it was well settled that the bankruptcy court was *without jurisdiction* to decide upon adverse claims of property, not in the possession of the assignee in bankruptcy, by summary proceedings—petition and rule to show cause, or notice—and that this was equally so, whether the adverse claim was to the absolute title of the property, or only to a lien thereon. In

Smith v. *Mason*, 14 Wall., 419,

an assignee in bankruptcy under the law of 1867 filed

a petition in the bankruptcy court against a third person, who was in the possession of a fund and claimed it adversely, asking that it be awarded to the assignee. In answer to an order to show cause the claimant set up that "the court had no jurisdiction to proceed against him in that mode," and this court so held, saying:

"Special provision is made for the revision in the Circuit Court of controversies like the one exhibited in this record, and the court is of the opinion that such causes cannot be commenced by a petition for a rule to show cause, as in this case, nor be determined in a summary way by the District Court sitting in bankruptcy, without due process of law. * * *

Suffice it to say, without expressing any opinion as to the weight of the evidence, the appellant claimed the fund as his own property, and if his claim is just and legal, the possession of the depositary was his possession, and if the assignee in bankruptcy would divest him of the possession and control of the fund he must do it by a suit at law or in equity, as provided in the third clause of the second section of the Bankrupt Act."

Marshall v. *Knox*, 16 Wall., 551,

a like summary proceeding, where this court extended this rule to adverse claimants of liens only, saying:

"The case here, then, depends on the question whether the District Court had jurisdiction to proceed by rule as it did. The goods, it has been seen, were in the custody of the sheriff, under a writ of provisional seizure, and held as a pledge for the rent of the lessor. The seizure had been made before the bankruptcy. The landlord claimed the right thus to hold possession of them until his claim for rent was satisfied. This claim was adverse to that of the assignee. The case presented was one of conflicting claims to the possession of goods; and the sheriff had present possession for the benefit of the lessor.

Neither the sheriff nor the lessor was a party to the proceedings in bankruptcy. No process had been served upon them to make them such. They were not before the court; and the court had no control or jurisdiction over them.

Under these circumstances the assignees applied for and obtained from the District Court, a rule on the lessor and sheriff to deliver the goods to them. Had the court authority to make such a rule? Could such a rule be characterized as due process of law? * * *

But it may, with some plausibility, be said that, as the property in this case is conceded to be in the bankrupt, and the question has respect only to the right of possession under the lien, the District Court, which has express jurisdiction of the 'ascertainment and liquidation of the liens and other specific claims' on the bankrupt's property, might properly assume control of the property itself. The claim, however, is to the right of possession, and that right may be just as absolute and just as essential to the interests of the claimant as the right of property in the thing itself, and is, in fact, a species of property in the thing just as much the subject of litigation as the thing itself. * * *

The court is of the opinion, therefore, that the District Court proceeded without jurisdiction in compelling the lessor and the sheriff, under a rule to show cause, to deliver up possession of the goods in question to the assignees."

Other cases illustrative of the application of this rule under the law of 1867, are:

Knight v. *Cheney*, 5 N. B. R., 305; Fed. Cas., No. 7883,

a case involving the right of the bankruptcy court to order, in a summary way, a sale of property claimed by the assignee in bankruptcy, but in the actual possession of a third person claiming it as owner. Mr. Justice Clifford held:

"Cases of the kind before the court, fall directly within the third clause of the section under consideration, and where the property in controversy at the time the debtor was adjudged bankrupt, was in the actual possession of a third person claiming absolute title and dominion of the same, the question of ownership, if the same is claimed by the assignee of the bankrupt, must be determined by a suit in equity or by an action at law, subject to re-examination as provided in the law of the forum where the suit is commenced."

And, in rejecting the contention of counsel that the "district court possessed in this case full power * * * to order that the goods should be sold, and that the proceeds should be held in place of the goods, as the measure of value in any subsequent controversy between the parties," the court said:

"Discretionary power, it must be conceded, exists in the district court to order a sale of the estate of the debtor, where it appears that the title is in dispute, if it also appears that the debtor was in possession of the estate at the time that he was adjudged bankrupt, and that the estate was duly transferred to the assignee and that it remained in his possession at the time the sale was ordered. Grant that the power of sale under that section, extends to such a case as that supposed, still the concession does not sustain the decision of the district court under revision, as the estate in this case was never transferred to the assignee, and was not in his possession at the time the order of sale was passed. On the contrary, it was in the actual possession of the respondent firm, claiming absolute title to, and dominion over the same as their own property. * * *

Viewed in any light, the court is of the opinion that the district court does not possess the power under that provision to order in a summary way the sale of an estate, real or personal, although the same

is claimed by the assignee, even though the title to the same is in dispute, if it also appears that the estate in question is in the actual possession of a third person, holding the same as owner and claiming absolute title to and dominion over the same as his own property, whether derived from the debtor before he was adjudged bankrupt or from some other former owner."

And upon a *petition for revision* the action of the lower court was reversed.

In re Marter, 12 N. B. R., 185; Fed. Cas., No. 9143,

where, upon a summary petition, a general assignee for the benefit of creditors had been enjoined from disposing of the property of the bankrupt in his possession, the assignee violated the injunction and sold the property, and a motion for an attachment for contempt was denied by Mr. Justice Brown upon the ground that the District Court was without power to determine the validity of the assignee's title by summary proceedings, and that the only remedy was by plenary suit at law or in equity.

In re Ballou, 3 N. B. R., 717; Fed. Cas., No. 818,

where property levied upon by execution was by order of the bankruptcy court delivered to the assignee in bankruptcy, and was by him sold subject to the determination of the court as to the validity of the lien claimed by the execution creditor, the assignee filing a petition praying that such lien be declared void, and the creditor filing an answer praying that it be adjudged valid and be paid out of the proceeds, and Mr. Justice Blatchford dismissed the petition, saying:

"The objection was taken, at the hearing, by the

counsel for the firm, that, inasmuch as the proceeding instituted by the petition of the assignee is one against the firm as claiming an adverse interest touching property or rights of property of the bankrupt, transferable to or vested in the assignee, it is wholly irregular, because it was not brought upon a plenary bill in equity, but by a summary petition and an order to show cause. On the authority of the recent decision made in the circuit court for this district, in the case of *In re Bonesteel* [Case No. 1627] this objection must be held to be well taken. As the petition falls, the answer must fall with it, and also the prayer of the answer, that the assignee may be ordered to satisfy the execution out of the proceeds of the sale of the property levied upon."

In re Bonesteel, 3 N. B. R., 517; Fed. Cas., No. 1627,

where, upon petition by an assignee in bankruptcy, against the wife of the bankrupt, the bankruptcy court, in a summary way, had decided that certain stock held by the wife belonged to the bankrupt, and Mr. Justice Nelson, upon *petition for review*, set aside the decree as founded upon irregular proceedings.

See, also:

Barstow v. *Peckham*, 5 N. B. R., 72; Fed. Cas., No. 1064.

Rogers v. *Winsor*, 6 N. B. R., 246; Fed. Cas., 12,023.

Under these cases, the proceeding in the District Court must be regarded as not an independent suit—because, as such, the District Court was without jurisdiction of it—unless there is something in the present bankrupt act which works a change in the law established by these cases.

But the present bankrupt act, instead of modifying, was adopted with reference to, and emphasizes the principles of these cases. Whereas, under the former statute, the District Court was given jurisdiction of independent suits brought either *by* or *against* the assignee in bankruptcy, the present act, as pointed out in *Bardes* v. *Hawarden, supra,* imposes an express restriction upon the jurisdiction of the District Court over independent suits brought *by* the trustee (or receiver) in bankruptcy.

Section 2 of the present act confers jurisdiction upon the District Courts *as courts of bankruptcy,* among other things to "(7) cause the estates of bankrupts to be collected, reduced to money, and distributed, and determine controversies in relation thereto, *except as herein otherwise provided.*" The italicized words, as this court has held in *Bardes* v. *Hawarden,* refer to section 23 of the act, the section which relates to the jurisdiction of courts and which provides:

"(b). Suits by a trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant."

In other words, the present statute in effect declares that the District Courts should not have jurisdiction of an independent suit brought *by* the trustee, when the defendant did not consent, but that the exclusive jurisdiction of such a suit should be in such courts as the bankrupt might have resorted to, if no bankruptcy proceedings had been instituted. Here, then, is an express statutory limitation on jurisdiction.

The fact that, after the court had overruled their objections to jurisdiction, these petitioners and the Storage Company followed the case—as, without a sacrifice, they could not otherwise do—does not amount to a waiver of these objections. Upon this point,

Louisville Trust Co. v. *Comingor,* 184 U. S., 18,

is a direct authority. In that case a rule was entered in the bankruptcy court requiring an assignee for creditors under a state statute to pay to the trustee in bankruptcy a certain sum retained by him for his commissions as assignee, and certain other money by him paid to his attorney. This adverse claimant tendered a formal response denying jurisdiction. This the bankruptcy court refused to entertain, and proceeded to a hearing on the merits, in which the claimant participated. Upon final hearing the bankruptcy court sustained its jurisdiction upon the ground that, by his "acquiescence in that mode of procedure," the claimant had assented to its jurisdiction. Thereupon the claimant filed his *petition for review* in the Circuit Court of Appeals, and upon a decision by that court, *this court issued certiorari* and affirmed the action of the Circuit Court of Appeals in reversing the bankruptcy court. The Chief Justice, after stating the nature of the claim, said (italics ours):

"This brought the controversy within the ruling in *Bardes* v. *Bank,* 178 U. S. 524, and the questions attempted to be litigated before the referee and in the District Court as to the allowance of the two amounts could only be raised in the District Court by consent, and then only by plenary suit. If the jurisdiction of

the District Court was not consented to, then the state court, under the circumstances of this case, was the proper forum, and the matters in dispute were to be disposed of there. * * *

The proceeding was purely summary. * * *

The question is whether the District Court had jurisdiction to finally adjudicate the merits in this proceeding. * * *

In many cases jurisdiction may depend on the ascertainment of facts involving the merits, and in that sense the court exercises jurisdiction in disposing of the preliminary inquiry, although the result may be that it finds that it cannot go farther. *And where in a case like that before us, the court erroneously retains jurisdiction to adjudicate the merits, its action can be corrected on review.*

We are of opinion that even if Comingor could have consented to be pursued in this manner, he did not so consent. He was ruled to show cause, and the cause he showed defeated jurisdiction over the subject matter, that is jurisdiction to proceed summarily. He did not come in voluntarily, but in obedience to peremptory orders, and although he participated in the proceedings before the referee, he had pleaded his claims in the outset, and he made his formal protest to the exercise of jurisdiction before the final order was entered."

In re Baudouine, 101 Fed., 574; 41 C. C. A., 318.

In that case a trustee in bankruptcy filed a petition, and took a rule to show cause, against certain testamentary trustees in order to secure an adjudication that a certain income, derived by the bankrupt under a will, belonged to his estate. Upon the return of the order to show cause, the trustees appeared—as did the petitioners in the present case—solely for the purpose of objecting to the jurisdiction of the

court, and insisted by demurrer that the court had no jurisdiction. This was overruled, the trustee answered and proceeded to trial upon the merits. The decision was in favor of the trustee in bankruptcy. Thereupon the testamentary trustees filed a *petition for review* in the Circuit Court of Appeals of the Second Circuit, which court reversed the order of the District Court, saying:

"If the testamentary trustees had an interest adverse to the trustee in bankruptcy in the fund sought to be reached in the present suit, they are entitled to be heard in a plenary suit. * * * But where the objection is taken in limine by the respondents, as it was here, it cannot be ignored, and the party who insists upon being heard in a plenary suit is entitled to that mode of procedure."

These two cases are direct authority for the proposition that, by proceeding with the case, after the District Court had overruled their objections to jurisdiction, these petitioners did not waive their right to insist upon them in the appellate tribunals, and that the character of the proceeding in the District Court was not thereby changed.

(See, also, *In re Ballou, supra.*)

These two cases also recognize a procedure, which is in direct conflict with the position of respondents on this motion. Each was removed to the Circuit Court of Appeals by petition for review, and one was brought from that court to this by *certiorari*. If, therefore, as contended by respondents, cases of this kind should go to the Circuit Court of Appeals by appeal, and not by petition for review, and hence should be brought to this court by appeal, and not by *certiorari*, then this court was without jurisdiction in the *Comingor* case.

Knight v. *Cheney* and *In re Bonesteel, supra,*—the law of 1867 not differing from the present act in this respect—were also reviewed by petition of review and not by appeal.

From the foregoing it follows that the proceeding in the District Court cannot be deemed an independent suit, from which an appeal would lie to the Circuit Court of Appeals under the Judiciary Act of 1891, because, by express statute the District Court had no jurisdiction of such a suit.

It does not, however, necessarily follow that this proceeding is to be regarded as *coram non judice* in the District Court. This court will not, we apprehend, so characterize a proceeding in a District Court, unless the record necessarily requires this. If upon any reasonable theory the jurisdiction of the lower court can be sustained, it should be. There is no difficulty in sustaining this proceeding *as a proceeding in bankruptcy.*

Section 2 of the present bankrupt act makes the District Courts "courts of bankruptcy" and invests them with such jurisdiction as will enable them "to exercise original jurisdiction *in bankruptcy proceedings,* to * * * (7) cause the estates of bankrupts to be collected, *reduced to money,* and distributed, and determine controversies in relation thereto, except as herein otherwise provided. * * * Nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specified powers not herein enumerated."

This section contains eighteen separate enumera-

tions of powers, not necessary to be here set out. A reference to them will show that every one of them (except clause 4, which confers jurisdiction of crimes against the bankrupt law) relates to the exercise of some power necessary to administer and distribute the bankrupt's estate. The exercise of every power there enumerated would give rise to some order in the bankruptcy case, considering all that takes place between the petition for adjudication and the last order in the case (as suggested by this court in *Lathrop* v. *Drake*, 91 U. S., 516) as one case. Clause 7 is, we conceive, no exception to this statement. The words "except as herein otherwise provided" are words of limitation upon the jurisdiction conferred by section 2 upon district courts *as courts of bankruptcy*, the jurisdiction which they have of independent suits being apparently conferred by other provisions of the statute.

By this clause 7 courts of bankruptcy are given jurisdiction to cause the estates of bankrupts to be collected, *reduced to money*, and distributed, and to determine certain controversies in relation thereto. The law here contemplates that the bankruptcy court, acting through a trustee, may proceed in the *collection* of the estate, until an adverse claimant in possession is reached, when it must stop, unless such claimant consents to have it decide the controversy.

So, too, the bankruptcy courts are by this clause given jurisdiction of proceedings, wherein it is sought to have estates *reduced to money*, and may determine certain controversies that may arise while it is so acting. Under this power it may proceed until a contro-

versy is reached with an adverse claimant in possession, who objects to a hearing in the bankruptcy court, when it must stop. It may be that a proceeding to reduce to money property *in the possession of the trustee* does not create a controversy with an adverse claimant of the property; but where, in a proceeding to sell property, the court finds it to be in the possession of an adverse claimant, its jurisdiction to proceed is at an end by the express provision of the present statute.

This is in perfect harmony with the former bankrupt act, under which, as we have seen, the bankruptcy court was without power to order a sale of property (claimed by the trustee in bankruptcy) which was in the possession of an adverse claimant.

But from this it does not follow that the court is without jurisdiction *ab initio*. It necessarily must have jurisdiction to proceed up to the point of determining that there exists an adverse claim; that is, that the property is in the possession of an adverse claimant.

Louisville Trust Co. v. *Comingor*, 184 U. S., 18.
Mueller v. *Nugent*, 184 U. S., 1.
In re Baird, 116 Fed., 765.
In re Kane, 131 Fed., 386,

are authorities for this proposition.

The necessity for this is well illustrated by the case at bar. This proceeding started in the District Court by the receiver filing a petition which recited that the receiver "has taken possession of the property" in controversy. The petitioners at bar and the Storage Company filed pleadings denying that the property

was in the possession of the receiver, and claiming that it was in that of the Storage Company. Here, then, was a dispute as to possession. If the averments of the receiver's petition were true, the court had jurisdiction to sell. If the claim of the petitioners and the Storage Company were sustained, the court was without jurisdiction to sell, because without possession of the property to be sold. It would seem, therefore, that the District Court, acting as a court of bankruptcy and in a bankruptcy proceeding, was justified in proceeding to determine this controverted fact. This it did through a reference to a referee, whose conclusion against the possession of the receiver and in favor of the possession of the Storage Company the District Court at first rejected, but finally concurred in.

What, in this state of the case, if there had been in the meantime no sale, would have been the proper action for the District Court to have taken? Clearly an order to return the property to the possession of the adverse claimants.

But, because of the protracted hearing of this controversy, the nature of the property, and state of the market, the interests of all parties required that the property, the possession of which was in dispute, should be sold, and the District Court directed one of these adverse clamants to sell the property and hold the money subject to the order of the court. Does this change the situation? Clearly not. The money stood in lieu of the property, and, when the District Court finally decided the possession to be in the adverse claimant, the only order it could properly

make was an order returning the money, as it did, to the adverse claimants.

It would seem, therefore, that the proceedings in the District Court was not *coram non judice,* but that court was, under its power, *as a court of bankrupty,* to proceed to cause the bankrupt's estate to be "reduced to money," acting properly in determining the fact—upon which its jurisdiction in this respect was based—whether the property was or was not in the possession of the receiver, that is, within its jurisdiction. In this view is it not clear that the proceeding was a proceeding in bankruptcy?

The Circuit Court of Appeals sustained the jurisdiction of the District Court upon the ground that the court had acquired a fund and had jurisdiction, as any court would, to dispose of it. (Rec., 388.) In another similar case (*In Re Antigo Screen Door Co.,* 123 Fed., 249) that court also decided that a proceeding, jurisdiction of which rested upon this ground, was a proceeding in bankruptcy.

While this view is in our favor, its reasoning on this point is not altogether satisfactory, because it seems to us that the nature of the proceeding in the District Court is not to be determined by the fact that the court had acquired a fund by an improper sale of property. As already stated, the nature of this proceeding is to be determined by considering it as a whole, and not any one order in it. If a court could create jurisdiction in itself by proceeding, contrary to law, to turn property into money, then it would be in the power of a court of bankruptcy to create jurisdiction in itself

where it really had none. We cannot conceive that a court by its own improper assertion of jurisdiction, can give itself any jurisdiction whatever. If, under a misapprehension, or in ignorance of the real facts, it seizes, through its officers, property and orders it sold, the orderly administration of justice requires that, when it ascertains the real facts, it should return the property to the parties from whom it had improperly taken it. If, pending an investigation of the facts, it reduces the property to money, its duty is the same. To hold that it has any other jurisdiction or power is to create a right to proceed out of an improper act.

What has been said above is sufficient, it is apprehended, to distinguish the case at bar from *Hewit* v. *Berlin Machine Works,* 194 U. S., 296, upon which respondents rely. That was not a proceeding instituted *by* a receiver or trustee in bankruptcy against an adverse claimant in possession of the property, but one brought by the adverse claimant in the District Court to recover possession of property held by the trustee. It did not fall within Section 23b. There was no objection to jurisdiction interposed. The District Court, in deciding the case, did not transcend a statutory limit imposed upon its jurisdiction.

It is therefore respectfully submitted that the motion to quash should be denied.

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Of Counsel.